

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KROGER LIMITED PARTNERSHIP I,
MID-ATLANTIC

Respondent,

and

Case 5-CA-155160

UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL 400 (UFCW),

Charging Party.

RESPONDENT, KROGER LIMITED PARTNERSHIP I, MID-ATLANTIC'S
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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Kroger Limited Partnership I, Mid-Atlantic (hereinafter, "Kroger" or the "Company"), by counsel, pursuant to Section 102.46(a) of the Rules and Regulations of the National Labor Relations Board, takes exception to Administrative Law Judge Donna N. Dawson's ("ALJ") September 9, 2016 Decision (the "Decision") as follows:¹

1. The ALJ's erroneously found that Kroger's act of calling the police to remove the representatives of UFCW Local 400 (the "Union") from Kroger's property was "unprecedented" and, therefore, served as evidence of discriminatory conduct on Kroger's part is in error. ALJD 12:14-24. The ALJ drew this conclusion from the testimony of Kroger Store Manager, Donati High, asserting that Mr. High called the police when the union representatives refused to leave the parking lot, but did not do so with "church group members who ignored him and repeatedly returned to solicit donations on Kroger 538 premises." Id. However, the church group members only "ignored" Mr. High in the sense that they came back more than once; critically, the evidence clearly establishes that they left the property when asked to do so, while the union witnesses conceded that they expressly refused to leave unless the police were called. (Tr. 62-63). As such, the Union representatives who refused to leave and the church members who left when asked presented very different situations, and the act of calling the police to remove the only people who stated that they would not leave until that happened was not evidence of discrimination.

2. The ALJ misapplied Supreme Court and Board precedent and made findings contrary to the record evidence in concluding that the Union representatives' actions constituted activity protected by Section 7 of the National Labor Relations Act (the "Act"). ALJD 10:42–

¹ Citation to "ALJD ____" refers to the page(s) and line number(s) of the ALJ's Decision dated September 9, 2016. Citation to "Tr. ____" refers to the page(s) of the transcript from the hearing in this matter conducted on March 29, 2016.

11:11. The Union representatives who were excluded from the property were (a) not exercising any organizational rights; and (b) not petitioning for area standards. Rather, they were merely attempting to harm the company's business (by design) in order to express displeasure with a particular aspect of the bargaining relationship between Kroger and its employees. (Tr. 58, 60-61; GC Ex. 3). Such "do-not-patronize" activity by non-employee union representatives of a union that has already organized the store in question is not protected by Section 7 of the Act. Thus, the ALJ misapplied or otherwise disregarded Supreme Court precedent in concluding that such non-employee activity was protected.

3. The ALJ misapplied Supreme Court and Board precedent and made findings contrary to the record evidence in concluding that Kroger's actions discriminated against the Union. ALJD 11:13-16:17. While the ALJ concludes that Kroger violated the Act "by excluding union solicitation on its premises while at the same time favoring and permitting charitable and civic solicitation activity," Supreme Court precedent (as recognized by numerous Circuit Courts of Appeal) provides that such conduct does not, in fact, constitute "discrimination" against the Union within the meaning of Babcock & Wilcox, 351 U.S. 105, 112 (1956).

WHEREFORE, Respondent Kroger respectfully requests that the Board refuse to adopt the Decision and recommendations of the ALJ, but rather dismiss the complaint in its entirety. Kroger relies on the exceptions set forth above and its Brief in Support of Exceptions to Administrative Law Judge's Decision filed herewith.

Respectfully submitted,

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STATEMENT OF SERVICE

I hereby certify that a copy of Kroger Limited Partnership I, Mid-Atlantic's
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION, in case 5-CA-155160,
was E-Filed and served by e-mail on this 7th day of October 2016, on the following:

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